APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 18, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 06-4347

(E.D. Pa. Civ. No. 05-cv-01334)

KARL RAINEY,

Appellant

v.

DAVID DIGUGLIELMO, et al.,

Present: SLOVITER, CHAGARES AND GREENBERG, CIRCUIT JUDGES

ORDER

The foregoing motion by Appellant for an enlargement of the page limitation for an application for certificate of appealability is granted. Appellant's application for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). For essentially the reasons discussed by the District Court, jurists of reason would not debate the correctness of the District Court's decision to deny Appellant's petition filed pursuant to 28 U.S.C. § 2254. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Appellant has failed to make a substantial

showing of the denial of a constitutional right, and a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

By the Court,

/s/ Morton I. Greenberg
Circuit Judge

Dated: May 18, 2007

APPENDIX B MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 7, 2006

IN THE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 05-1334

KARL RAINEY

v.

DAVID DIGUGLIELMO, et al.

MEMORANDUM

Presently before the Court is Karl Rainey's counseled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On January 12, 2006, Magistrate Judge Peter B. Scuderi filed a Report and Recommendation ("R & R") recommending that we deny the Petition in its entirety. On April 5, 2006, Petitioner filed timely Objections to the R & R. For the reasons that follow, we overrule Petitioner's Objections, adopt the R & R as amplified by this Memorandum, and deny the Petition in its entirety.

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I. BACKGROUND

On August 10, 1995, following a jury trial before the Honorable Paul Ribner of the Philadelphia County Court of Common Pleas, Petitioner was found guilty of the first degree murder of Kenneth White, aggravated assault upon Ervin Boyd, and carrying a firearm on the public street. The Pennsylvania Superior Court ("Superior Court") set forth the relevant facts as follows:

> [Petitioner] and the Decedent Kenneth White had several verbal confrontations prior to the night of the murder. On the night in question, [Petitioner] was leaving a bar when Decedent and his friend Ervin Boyd were entering the bar. [Petitioner] and Decedent began to argue as [Petitioner] walked to his car. Boyd followed along. Upon arriving at his car, [Petitioner] pulled a gun from his jacket and shot Decedent several times. [Petitioner] then shot Boyd who hid behind a parked car. [Petitioner] cleared a j am in his gun, returned to Decedent's body and fired three more shots into Decedent's back. Then, [Petitioner] found Boyd and shot him three more times. As [Petitioner] fled from the scene, he ran over Boyd and dragged him one block from the scene. Boyd survived and Decedent bled to death. No weapon was found on or near Decedent's body.[1]

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1. The state court's factual findings are accepted as correct, absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e). Petitioner argues that the Commonwealth's own

(Cont'd)

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Commonwealth v. Rainey, 698 A.2d 110 (Pa.Super.Ct.1997) (table); No. 4275 PHL 1995, slip op. at 2-3 (Pa.Super.Ct. Jan. 16, 1997).

Petitioner was sentenced to life imprisonment for the murder and received concurrent sentences of 5-10 years on the assault charge and 1-2 years on the firearms violation. Petitioner appealed to the Superior Court, which affirmed his judgment of conviction on January 16, 1997. *Id.* at 4. Petitioner sought discretionary review by the Pennsylvania Supreme Court, but the Supreme Court denied allowance of appeal on November 3, 1997. *Commonwealth v. Rainey*, 704 A.2d 637 (Pa.1997) (table).

On October 30, 1998, Petitioner filed a *pro se* petition for state collateral review pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. Ann. § 9541. The PCRA court appointed counsel who, on June 8, 2000, filed an amended PCRA petition. The amended petition contended that Petitioner received ineffective assistance of counsel because, among other reasons: (1) trial counsel failed to call Petitioner's brother, Kurtis Rainey, as a witness; (2) trial counsel failed to object to the testimony of the Commonwealth's ballistics expert and failed to obtain a defense ballistics

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evidence at trial was that the Petitioner and the Decedent had only one confrontation prior to the night of the shooting, and that Petitioner attempted to peaceably leave the bar and proceed to his car, whereas the Decedent persisted in following Petitioner and haranguing him in a threatening manner. Such factual distinctions are not material to this Memorandum.

expert; and (3) appellate counsel failed to raise the issue of jury recantation. *Commonwealth v. Rainey*, No. 0710, slip op. at 2 (Phila.Ct.Com.Pl. Nov. 17, 2003). On June 4, 2002, after a hearing, the PCRA court dismissed the amended petition as being without merit. *Id.* Petitioner appealed to the Superior Court, asserting his ineffective assistance of counsel claims and contending as well that the PCRA court improperly denied his request to retain the state-funded services of an independent expert ballistics examiner. *Commonwealth v. Rainey*, 863 A.2d 1229 (Pa.Super.Ct.2004) (table); No. 2861 EDA 2002, slip op. at 2 (Pa. Super Ct. Sept. 9, 2004). On September 9, 2004, the Superior Court affirmed the PCRA court's decision, *id.*, and on February 22, 2005, the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal. *Commonwealth v. Rainey*, 868 A.2d 1199 (Pa.2005) (table).

On March 25, 2005, Petitioner filed the instant Petition for Writ of Habeas Corpus, raising the claims that Petitioner had previously asserted before the PCRA court and before the Superior Court on appeal. The Magistrate Judge issued a Report and Recommendation ("R & R") advising that the Petition be denied in its entirety because it fails on the merits. Petitioner's Objections to the R & R present no new issues or arguments; Petitioner primarily contends that the Magistrate Judge failed to appreciate the extent to which evidence that there was a second gunman could have exonerated Petitioner and, as a consequence, incorrectly analyzed the claims presented in the instant Habeas Petition.

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II. STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for an R & R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

The instant Petition was filed pursuant to 28 U.S.C. § 2254, which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, this Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214; *see Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by the AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

> established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1). Under the AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States ." *See* 28 U.S.C.A. § 2254(d)(1). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the time of the relevant state court decision. *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. *Werts v. Vaughn,* 228 F.3d 178, 197 (3d Cir.2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. *See Williams,* 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. *Id.* Alternatively, a state court decision is contrary to

Supreme Court precedent where the state court confronts a case with facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. *Id.* at 406. If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, the federal habeas court may grant relief at this juncture. *Matteo v. Superintendent S.C.I. Albion*, 171 F.3d 877, 890 (3d Cir.1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. *Id.* A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. *Williams*, 529 U.S. at 407. To grant a writ of habeas corpus under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. *Id.* at 409; *Werts*, 228 F.3d at 197. A federal court cannot grant a writ of habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. *Williams*, 529 U.S. at 411; *Matteo*, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively unreasonable, habeas courts may consider the decisions of inferior federal courts. *Matteo*, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *United States Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306, 309 (3d Cir.1985).

III. DISCUSSION

A. *Ineffective Assistance of Counsel*

Petitioner accepts the standard of review the Superior Court identified as governing ineffective assistance of counsel claims but argues that the Superior Court unreasonably applied it to the facts of his case. The Superior Court used the following standard in analyzing Petitioner's claims of ineffective assistance of counsel in his PCRA petition:

> [t]o prevail on a claim that counsel was constitutionally ineffective, the [Petitioner] must overcome the presumption of competence by showing that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate [Petitioner's] interests; and (3) but for counsel's ineffectiveness, there

> is a reasonable probability that the outcome of the challenged proceeding would have been different. A failure to satisfy any one prong of the test for ineffectiveness will require rejection of the claim.

Commonwealth v. Rainey, No. 2861 EDA 2002, slip op. at 3 (citing *Commonwealth v. Wharton*, 811 A.2d 978 (Pa.2002)). The Pennsylvania Supreme Court has determined that this standard is the same as that set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Young v. Vaughn*, Civ. A. No. 00-3512, 2002 U.S. Dist. LEXIS 4094, at * 18 (Mar. 6, 2002) (citing *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (Pa.1987)). The United States Court of Appeals for the Third Circuit has also examined this standard and has determined that its application does not contradict the Supreme Court's holding in *Strickland* and, therefore, is not contrary to established Supreme Court precedent. *Werts*, 228 F.3d at 204.

In *Strickland*, the Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, 466 U.S. at 687, and set forth a two-prong test for determining ineffective assistance of counsel. A defendant first must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. "In evaluating counsel's

performance, [the court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy.' " *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir.1999) (quoting *Strickland*, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, [ ] it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.' " *Id.* (citing *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.*

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1. *Failure to present the testimony of Kurtis Rainey*

In his first objection, Petitioner contends that his trial counsel's failure to present his brother Kurtis Rainey's testimony constitutes ineffective assistance under any reasonable application of Supreme Court precedent. Petitioner maintains that his brother's testimony would have significantly supported his contention at trial that he acted in self defense in the death of Kenneth White. Indeed, Petitioner does not dispute that he fired at least two shots from a. 380 caliber pistol at White, but he insists that he fired the shots only upon the legitimate belief that White was reaching inside his coat for a gun. (8/9/95 N.T. at 52-58, 95, 97-99.) At Petitioner's trial, the medical examiner, Dr. Stephanie Mills, testified that the Decedent suffered eight gunshot wounds to the chest, the abdomen, and the back. (8/8/95 N.T. at 113, 127.) The Decedent's wounds were created by both .380 caliber and 9 millimeter caliber bullets. (8/8/95 N.T. at 83-84.) The Commonwealth put on evidence by a ballistics experts, Lieutenant Mark Stephan, who testified that 9 millimeter ammunition can be fired from a .380 caliber firearm. (8/8/95 N.T. at 88-89, 103.) The Commonwealth relied on that testimony to argue at trial that all of the shots to the Decedent originated with the Petitioner. (8/9/95 N.T. at 111-12, 119-120.) The Commonwealth further asserted that, since the Decedent was shot through the back, Petitioner could not possibly have been acting in self defense. (8/9/95 N.T. at 106-07, 113-16, 119-120.) Petitioner, in contrast, testified at trial that, although he was responsible for

frontal wounds to the Decedent, having shot the Decedent in fear for his life, he was not responsible for the additional wounds to the Decedent's back. (8/9/95 N.T. 58-61, 100-02). Petitioner maintained that there was a second gunman-his friend, Kevin Williams-who was present at the scene, armed with a 9 millimeter pistol, and who, without Petitioner's consent or prior agreement, fired the final, ultimately fatal, shots into the Decedent's back while the Decedent was already disabled. (8/9/95 N.T. at 58-61, 78-79, 100-102.) Petitioner argues that such a scenario militates in favor of self-defense and that corroborating testimony from his brother was critical to its believability.

Petitioner attached an affidavit from his brother to his PCRA petition, and Kurtis Rainey testified at Petitioner's PCRA hearing. At the time of the hearing, Kurtis Rainey was an officer with the West Whiteland Township, Pennsylvania police department. (6/21/2001 N.T. at 31, 34.) In his affidavit and hearing testimony, Kurtis Rainey stated that on the day of the shooting, Petitioner and Williams visited him and related a version of what had happened that was consistent with Petitioner's trial testimony. (Kurtis Rainey Aff. ¶ 3; 6/21/2001 N.T. at 32.) In the process of describing the events of the early morning, Williams told Kurtis Rainey that "the motherfucker tried to get your brother. . . . Your brother shot them and then I finished it." (Kurtis Rainey Aff. ¶ 4; 6/21/2001 N.T. at 32.) Kurtis Rainey observed that Williams was carrying a silver-plated 9 millimeter pistol. (Kurtis Rainey Aff. ¶ 4; 6/21/2001 N.T. at 33.) Kurtis Rainey informed Petitioner's trial counsel of these

facts, indicated a willingness to testify on Petitioner's behalf, and was present and available at trial. (Kurtis Rainey Aff. ¶¶ 6-7; 6/21/2001 N.T. at 33.)

On post-conviction review, the Superior Court found under the equivalent of *Strickland's* prejudice prong that Petitioner's trial counsel was not ineffective for failing to present Kurtis Rainey's testimony. The Superior Court wrote that

> [i]n light of [Petitioner's] admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound, the introduction of testimony by [Petitioner's] brother which referenced a second gunman would not have exonerated [Petitioner]. As such, [Petitioner's] accusation of ineffective assistance of counsel fails because the underlying argument is without merit."[2]

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2. The Superior Court also noted that, at Petitioner's PCRA hearing, his trial counsel testified that he met and discussed with Kurtis Rainey the alleged confession by Williams and that he investigated it extensively, interviewing a "number of other witnesses prior to trial to in connection with determining that alleged confession, its existence, non-existence, validity." (9/21/01 N.T. at 6.) Upon failing to locate Williams or to find anyone who could verify the alleged confession, trial counsel elected not to present the testimony fearing that "the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers." (9/21/01 N.T. at 7.) The Superior Court wrote (Cont'd)

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Commonwealth v. Rainey, No. 2861 EDA 2002, slip op. at 5.

Petitioner argues that this conclusion is unreasonable based on the evidence at trial. Petitioner maintains that his brother's testimony would have confirmed that he had not fabricated the existence of a second gunman with a 9 millimeter handgun, and that he did not have the intent to kill associated with shooting an incapacitated man through the back. Petitioner contends that he had a credible claim of self-defense, based in part on the reputations of White and Boyd for carrying guns and shooting people (8/9/95 N.T. at 46-47, 51-53), and it was essential to that defense to introduce all available evidence that it was Williams who, in the heat of the moment or for reasons of his own, decided to execute White.

We agree with the Magistrate Judge that the Superior Court's application of the federal law set forth in *Strickland* was not objectively unreasonable; Petitioner cannot demonstrate the requisite probability that the outcome of his proceeding would have been different if the jury had heard his brother's testimony regarding the existence a second shooter. "In considering whether a petitioner suffered prejudice, the effect of counsel's inadequate performance must be evaluated in

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that "it is well established that ineffective assistance of counsel will not be found where there is a reasonable basis for counsel's decision based on a matter of trial strategy." *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 5.

light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Rolan v. Vaughn,* 445 F.3d 671, 681-82 (3d Cir.2006) (quotation omitted). Petitioner testified that he saw Williams stand over White and shoot him, and his lawyer argued the existence of a second gunman in his closing statements. (8/9/95 N.T. at 58-61, 100-102.) Even if Kurtis Rainey had been allowed to bolster the second gunman theory through his own testimony, the jury might have rejected his account based upon the conflicting testimony of Boyd. Boyd stated at trial that, although he admittedly did not see the face of the person who shot White in the back, from what heard while lying injured underneath a car, he believed Petitioner was responsible. (8/7/95 N.T. at 96-99, 122-124.) In addition, the Commonwealth called as a witness Kevin White, a disc jockey on the scene of no relation to the Decedent, who testified that the same person, identifiable by his quarter-length black leather jacket, fired all of the shots to White. (8/8/95 N.T. at 21-25.) Even if the jury had believed that there had been a second shooter, the undisputed fact that Petitioner shot an unarmed man at least two times and the testimony of Dr. Mills that "[t]he cause of death was multiple gunshot wounds to the chest and the abdomen and the back," could have led the jury to conclude that Petitioner committed first degree murder. (8/8/95 N.T. at 73, 127.) Accordingly, we find that the Superior Court's decision to affirm that trial counsel was not ineffective for failing to introduce testimony from Petitioner's brother was not contrary to Supreme Court precedent.

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2. *Failure to object to and present independent ballistics evidence*

Petitioner asserts that his trial counsel was ineffective for failing to object to the testimony of the Commonwealth's ballistics expert, Lieutenant Stephan, that both the .380 caliber and the 9 millimeter bullets that penetrated the Decedent's chest, abdomen, and back could have been fired from the same .380 caliber firearm. (8/8/95 N.T. at 88-89.) Petitioner asserts that this evidence was highly conjectural given that its scientific basis was that the expert had fired 9 millimeter bullets from a. 380 caliber firearm on a single occasion and that two live 9 millimeter rounds found on the street in the vicinity of the shooting had deformities that might have been indicative of a feed problem. (8/8/95 N.T. at 89-94, 104-05.) Petitioner contends that his trial counsel should have challenged Lieutenant Stephan's testimony as inadmissible on the ground that it ran afoul of Pennsylvania's evidentiary prohibition against the admission of expert testimony based on "conjecture or guesswork." *See Commonwealth v. Britcher,* 563 A.2d 502, 508 (Pa.Super.Ct.1989).

Petitioner also contends that his trial counsel was ineffective for failing to undermine the Commonwealth's single gunman theory by presenting countervailing expert testimony. Petitioner has submitted a detailed report from Gerald Styers, a forensic consultant, which indicates that the firing of 9 millimeter ammunition from a. 380 caliber weapon is highly unlikely, and that if such a firing had taken place at the crime scene, there should

have also been distortions on the fired cartridge cases, something Lieutenant Stephan never addressed. (Pet.Obj.Ex.O.) The report additionally explains that numerous factors may have caused the deformities on the live ammunition observed by Lieutenant Stephan, including dirt in the firearm. (*Id.*) Petitioner asserts that such independent expert information could have been used effectively in cross examination, could have been the subject of affirmative defense testimony, and might even have been used in limine to support the exclusion of Lieutenant Stephan's testimony. According to Petitioner, the Commonwealth was only able to argue with any authority that Petitioner was the only shooter because of trial counsel's failures.

The Superior Court held, with respect to trial counsel's handling of the ballistics evidence, that there was no reason to disturb the PCRA court's ruling that "trial counsel had a reasonable basis designed to effectuate [Petitioner's] interests under the given circumstances," and therefore, that trial counsel's performance was not outside the range of reasonable professional judgment. *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 7. The Superior Court relied upon trial counsel's testimony at Petitioner's PCRA hearing. Trial counsel testified, regarding his failure to make objections, as follows:

> "[Lieutenant Stephan's] testimony was basically I wouldn't say worthless but it had no weight to it given the fact that he conceded it could have been fired from the same firearm

> or could have been fired from two or not, he didn't know. So as a practical matter I don't know if his testimony really carried much weight. . . . When he testified and made it plain that he could not say one way or another whether [the bullets] were fired from one [1] gun or two [2] guns or more than two [2] guns, as a practical matter objecting to it really would not have served the purpose for a couple of reasons. Number one is that the jury already heard it. Two, I didn't want to emphasize it for the jury. And three is if I could save it for argument and say, listen, he wasn't able to say definitively one way or the other, his testimony has no weight and no significance.

(6/21/01 N.T. at 17, 20.) Regarding his failure to hire an independent ballistics expert, trial counsel said that he did not need an expert to refute what he thought was simply the inference that the cartridges might have been fired from the same gun. (6/21/01 N.T. at 8.) He added that, because no guns had been recovered (Petitioner threw his weapon into the Schuylkill River), he knew that it was impossible for any ballistics expert to connect the bullets recovered from the crime scene to a specific firearm. (6/21/01 N.T. at 17, 20.) Based upon trial counsel's testimony, we conclude that the Superior Court was not objectively unreasonable in finding that the PCRA court correctly decided that counsel's ballistics-related decisions were strategically defensible. *See Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir.2006)

("*Strickland* and its progeny make clear that counsel's strategic choices will not be second-guessed by post hoc determinations that a different trial strategy would have fared better." (internal citations omitted)).

Moreover, with respect to trial counsel's failure to obtain a ballistics expert for the defense, we agree with the Magistrate Judge that Petitioner has not established that there is a reasonable probability that the results of his trial would have been different if a defense expert had been made available. The testimony of the defense expert could have indicated that it was more, rather than less, likely that the bullets collected from the crime scene were produced from two separate firearms, but Lieutenant Stephan also allowed for the possibility of two gunmen in his testimony. (8/8/95 N.T. 94-95, 99 ("I am not certain-scientifically certain, . . . that [the fired cartridge cases] came from the same firearm. So I am saying, it is my opinion that it's possible that they did, but I can't be sure.").) Trial counsel emphasized on cross examination that Lieutenant Stephan believed that there could have been two gunmen:

> Q. But you are not excluding the possibility that they [the fired cartridge cases] could have come from two firearms; is that correct?
>
> A. No, I can't. Not scientifically, no.
>
> Q. You can't exclude the possibility that the .380s came from a .380 or a 9 millimeter came from a 9 millimeter, can you?

A. Correct.

(8/8/95 N.T. at 106.) In addition, we have already found that the Superior Court was not unreasonable in deciding that even if Petitioner had conclusively established the existence of a second shooter, such evidence might not have influenced the outcome of the trial. Accordingly, we conclude that the Superior Court's decision, to affirm that trial counsel's failure to object to the testimony of the Commonwealth's ballistics expert and failure to produce a defense ballistics expert was not ineffective assistance, did not reflect an unreasonable application of Supreme Court precedent.

3. *Failure to raise issue of juror recantation of appeal*

Petitioner maintains that his appellate counsel was ineffective for failing to raise the issue of juror recantation on direct appeal. The relevant facts, as set forth by the Superior Court, are as follows:

> the jury submitted its verdict in open court; the jury was polled upon the request of [Petitioner] whereby all members concurred; the verdict was recorded; the jury acknowledged in the affirmative the verdict as recorded; and the jury was discharged to reconvene the following day for sentencing. The following day, prior to the sentencing hearing beginning, one juror recanted his verdict on his own volition.

Commonwealth v. Rainey, No. 2861 EDA 2002, slip op. at 8. The Superior Court found that appellate counsel's failure to argue juror recantation did not fall outside the range of reasonable professional assistance because the underlying issue was without merit, and it thereby denied this claim of counsel ineffectiveness under the equivalent of *Strickland's* performance prong. *Id.* at 9.

It is well-settled that an attorney cannot be found ineffective for failing to raise a meritless claim. *See Strickland,* 466 U.S. at 691 (1984); *United States v. Sanders,* 165 F.3d 248, 253 (3rd Cir.1999). Petitioner contends that his claim is not meritless because, while the rule in Pennsylvania is that "after a verdict is recorded, and after the jury has been separated and discharged, jurors may not invalidate or impeach a verdict by their testimony," *Commonwealth v. Patrick,* 206 A.2d 295, 297 (1965), his jury was not discharged at the time of the impeachment, as it had yet to convene for sentencing. The Superior Court addressed this contention directly and concluded that "even though the same members of the jury were to reconvene for sentencing the following day, they were effectively discharged from the guilt phase of the trial. The law is clear, that after a jury verdict is duly recorded and the jury has been discharged, individual jurors may not invalidate or impeach their verdict by their own testimony without claiming outside influence." *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 9 (citing *Patrick,* 206 A.2d at 295; *Commonwealth v. Spencer,* 393 A.2d 895 (Pa.Super.Ct.1978); *Commonwealth v. Stark,* 526 A.2d

383 (Pa.Super.Ct.1987)). The Third Circuit instructs that " 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. . . .' " *Warren v. Kyler*, 422 F.3d 132, 136 (3d Cir.2005) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *cf. Williams v. Price*, 343 F.3d 223, 235 (3d Cir.2003) (noting that enforcement of Pennsylvania's "no impeachment rule" is a matter for Pennsylvania courts). Accordingly, we assume that the Superior Court's interpretation of Commonwealth law governing juror recantation is correct. We conclude, therefore, that appellate counsel was not ineffective for failing to raise juror recantation when the juror in question was not permitted to impeach his own verdict. We further conclude that the Superior Court did not unreasonably apply Supreme Court precedent in affirming the PCRA court's decision in this regard.

B. *PCRA Court Error*

Petitioner argues that the PCRA court violated his due process and equal protection rights when it denied his request for a ballistics expert at state expense. Petitioner argues that he was entitled to an expert under the Supreme Court precedent established by *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* addressed the rights of indigent criminal defendants, whose sanity is in issue, to state-sponsored psychiatric assistance in preparing their defenses. The Supreme Court identified three factors to be used in determining whether the state must fund access to such expertise:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation if those safeguards are not provided.

Id. at 77. The Superior Court upheld the PCRA court's decision not to provide Petitioner with a state-sponsored ballistics expert based on its finding that Petitioner offered "no reasonable support as to how a ballistics expert would further [his] argument regarding a second gunman." *Commonwealth v. Rainey,* No. 2861 EDA 2002, slip op. at 7. Petitioner contends that the Superior Court's conclusion is unreasonable. Petitioner asserts that the Commonwealth's use of its own ballistics expert at trial demonstrates that the issue of whether there were one or two gunmen was clearly important and that it was nonsensical for the Superior Court to conclude that countervailing expert testimony would not have contributed to Petitioner's ability to rebut the one gunman theory.

We assume—for argument purposes only-that Ake is applicable outside the context of a psychiatric defense at the trial court level. *See Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1 (1985) (stating that *Ake* did not require the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, where the defendant

offered "little more than undeveloped assertions that the requested assistance would be beneficial," and refusing to reach the question of "what if any showing would have entitled a defendant to assistance of the type here sought"). Although the Superior Court did not explicitly rely on *Ake*, its rationale for denying Petitioner's request coincides with *Ake's* third prong, and we will, therefore, give its decision deference. *See Matteo*, 171 F.3d at 890. Petitioner acknowledges that on collateral review he was able to represent to the PCRA court how he thought an independent ballistics expert would have helped his defense. For example, Petitioner provided the PCRA court with an offer of proof from a forensic consultant stating that determination of whether the .380 and 9 millimeter caliber cartridges were fired from the same firearm required microscopic examination. (Pet.Obj.Ex.L.) Petitioner also submitted an offer of proof from the manufacturer of his .380 pistol, which stated that only early models could be forced to function with 9 millimeter ammunition. (Pet.Obj.Ex.M.) We find that, with respect to Petitioner's claims on collateral review, a full-length independent report by a state-funded ballistics expert would have added little probative value. Accordingly, we decide that the Superior Court was not in error in affirming the PCRA court's decision to deny Petitioner the appointment of a ballistics expert.

IV. CONCLUSION

For the foregoing reasons, we conclude that the instant Petition is without merit. Accordingly, the Petition is denied. Moreover, as Petitioner has failed to

make a substantial showing of the denial of a constitutional right, the Court further concludes that there is no basis for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). An appropriate order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 05-1334

KARL RAINEY

v.

DAVID DIGUGLIELMO, et al.

ORDER

AND NOW, this 6th day of September, 2006, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and all attendant and responsive briefing, after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, and in consideration of Petitioner's Objections to the Report and Recommendation and all submissions filed in response thereto, **IT IS HEREBY ORDERED THAT:**

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED;**

2. The Report and Recommendation is **APPROVED** and **ADOPTED** to the extent that it is not inconsistent with the accompanying Memorandum;

3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED;**

4. A certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) is **DENIED;** and

5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:
s/ John R. Padova
John R. Padova, J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 12, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 05-1334

KARL RAINEY

v.

DAVID DIGUGLIELMO, et al.

REPORT AND RECOMMENDATION

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Karl Rainey ("Petitioner"), an individual currently incarcerated in the Graterford State Correctional Institution. For the reasons that follow, I recommend that the petition be denied.

FACTS AND PROCEDURAL HISTORY:

The relevant facts, set forth by the Pennsylvania Superior Court, are as follows:

> [Petitioner] and the Decedent Kenneth White had several verbal confrontations prior to the

> night of the murder. On the night in question, [Petitioner] was leaving a bar when Decedent and his friend Ervin Boyd were entering the bar. [Petitioner] and Decedent began to argue as [Petitioner] walked to his car. Boyd followed along. Upon arriving at his car, [Petitioner] pulled a gun from his jacket and shot Decedent several times. [Petitioner] then shot Boyd who hid behind a parked car. [Petitioner] cleared a jam in his gun, returned to Decedent's body and fired three [3] more shots into Decedent's back. Then, [Petitioner] found Boyd and shot him three [3] more times. As [Petitioner] fled from the scene, he ran over Boyd and dragged him one [1] block from the scene. Boyd survived and Decedent bled to death. No weapon was found on or near Decedent's body.

Commonwealth v. Rainey, 698 A.2d 110 (Pa.Super.1997) (table); No. 4275 PHL 1995, at 2-3 (Pa.Super.Jan.16, 1997) (unpublished memorandum), attached to Resp't Answer as Ex. "A."

On August 10, 1995, a jury sitting before the Honorable Paul Ribner, Court of Common Pleas of Philadelphia County, found Petitioner guilty of first degree murder, aggravated assault, and possession of an instrument of crime. The jury reached a verdict of life imprisonment for the murder conviction. The court sentenced Petitioner to concurrent terms of five (5) to ten (10) years of imprisonment for the assault charge and six (6) to twelve (12) months of imprisonment for the weapons charge.

Appendix C

Petitioner filed a direct appeal in the Pennsylvania Superior Court claiming:

> (1) there was insufficient evidence to prove first degree murder, specifically that the Commonwealth failed to prove beyond a reasonable doubt that he did not act in self defense; and
>
> (2) the verdict was against the weight of the evidence.

On January 16, 1997, the Superior Court affirmed the judgment of sentence. *Commonwealth v. Rainey, supra.* The Pennsylvania Supreme Court denied allocatur on November 3, 1997. *Commonwealth v.. Rainey,* 704 A.2d 637 (Pa.1997) (table).

On October 30, 1998, Petitioner sought relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. § 9541, *et seq.* Counsel was appointed to file an amended PCRA petition. An evidentiary hearing was held on June 21, 2001, before the Honorable William J. Mazzola, Court of Common Pleas of Philadelphia County. On June 4, 2002, Judge Mazzola dismissed Petitioner's PCRA petition, *Commonwealth v. Rainey,* No. 0710 (Phila.Ct.Com.Pl. Nov. 17, 2003) attached to Resp't Answer as Ex. "B."

Appendix C

Petitioner filed an appeal in the Pennsylvania Superior Court claiming:

> (1) ineffective assistance of trial counsel for failing to:
>
> > (a) present the testimony of Kurtis Rainey;
> >
> > (b) obtain a ballistics expert for the defense;
> >
> > (c) object to the testimony of the Commonwealth's ballistics expert;
>
> (2) ineffective assistance of appellate counsel for failing to raise on appeal his motion for mistrial after one juror recanted his verdict after the verdict had been recorded, but before the jury was discharged; and
>
> (3) PCRA court error for dismissing Petitioner's PCRA petition without appointing a ballistics expert to render a report.

The Superior Court affirmed the denial of PCRA relief on September 8, 2004. *Commonwealth v. Rainey,* No. 2861 EDA 2002 (Pa.Super.Sept.8, 2004) (unpublished memorandum). On February 22, 2005, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. *Commonwealth v. Rainey,* 499 E.D. Allocatur Docket 2004.

Appendix C

On March 23, 2005, Petitioner filed the instant petition for writ of habeas corpus advancing the claims he presented on collateral appeal. Respondents have filed an answer arguing that Petitioner is not entitled to habeas corpus relief because his claims are meritless.

DISCUSSION

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254. *Werts v. Vaughn*, 228 F.3d 178, 195 (3d Cir.2000). The AEDPA increases the deference federal courts must give to the factual findings and legal determinations of the state courts. *Werts* at 196 (citing *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir.1996)). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may only be granted if (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or if (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court expounded upon this language in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the Court explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir.2000) (citing *Williams*, 529 U.S. at 389-390). The Court in *Williams* further stated that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." [1] *Id.*

1. Ineffective Assistance of Trial Counsel for Failing to Present the Testimony of Kurtis Rainey

In his first (1st) claim, Petitioner contends that trial counsel was ineffective for failing to present the

1. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-389). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 389).

testimony of Petitioner's brother, Kurtis Rainey, at trial. Claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court set forth the standard for a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In determining prejudice, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "[A] court need not

determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id.*

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania courts' decision rejecting his claims of ineffective assistance of counsel was either "contrary to, or involved an unreasonable application of," that established law. *Id.* In finding that trial counsel's failure to call Kurtis Rainey was a reasonable, strategic decision, the Superior court stated, "Trial counsel testified he was aware of and investigated the allegations made by [Petitioner's] brother, and that counsel made a strategic decision not to present the brother's testimony without further support believing it would be harmful to [Petitioner's] case." *Commonwealth v. Rainey*, No. 2861 EDA 2002 at 6. Petitioner argues that Kurtis Rainey's possible testimony involved a potential second gunman, Kevin Williams. Petitioner asserts that his brother Kurtis was prepared to testify that Kevin Williams admitted to also shooting Kenneth White, and that Mr. Williams was in possession of a nine (9) millimeter firearm. During

Petitioner's PCRA hearing, counsel defended his decision not to call Kurtis Rainey as a witness:

> I tried to locate Kevin Williams, was unsuccessful. I thought there was a hearsay problem. I also thought that the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers.

N.T. 6/21/01 at 8. Clearly, counsel's decision not to call Kurtis Rainey was trial strategy. *See Hess v. Mazurkiewicz*, 135 F.3d 905, 908-909 (3d Cir.1998) (finding counsel not ineffective for failing to call witness because counsel reasonably could have believed that the prejudicial effect of testimony outweighed benefit to be gained).

Even assuming, however, that counsel's failure to call Kurtis Rainey was deficient, Petitioner presents no persuasive evidence that Kurtis Rainey's testimony would have changed the result of the trial. *Strickland*, 466 U.S. at 694 (to satisfy the prejudice requirement, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). As the Superior Court noted:

> In light of [Petitioner's] admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound; the introduction of testimony

> by [Petitioner's] brother which referenced a second gunman would not have exonerated [Petitioner].

Commonwealth v. Rainey, No 2861 EDA 2002 at 5; *see also Commonwealth v. Rainey,* No. 0717 at 4 ("This court finds that further attempts by the trial counsel, as Petitioner contends the counsel should have taken, to establish the existence of the second shooter would not have made a difference in the outcome of the trial.") In light of the fact that testimony implicating Kevin Williams as the second shooter would not have changed the result of the trial, I find that the state court decision on this matter did not result in an unreasonable application of federal law as established by the United States Supreme Court. Accordingly, this claim must be denied.

2. Ineffective Assistance of Trial Counsel for Failing to Object to the Testimony of the Commonwealth's Ballistics Expert or to Obtain a Ballistics Expert for the Defense

In his second (2nd) claim, Petitioner contends that trial counsel was ineffective for for failing to object to the testimony of the Commonwealth's ballistics expert who stated that both the .380 and 9 mm bullets recovered at the crime scene could have been shot with the same handgun. Petitioner also argues that trial counsel was ineffective for failing to obtain a ballistics expert for the defense. Petitioner asserts that ballistics evidence could have established the existence of a second shooter.

Petitioner raised these issues on PCRA review and it was the subject of extensive testimony at the PCRA hearing. *See* N.T. 6/21/01, at 11-30. As discussed, *supra*, the PCRA court found that even if the existence of a second shooter had been established, it would have been irrelevant to the outcome of the trial, as the court established that Petitioner shot the unarmed victim multiple times. *Commonwealth v. Rainey*, No. 0717 at 4.[2]

I find that Petitioner has not established that trial counsel was ineffective for not objecting to the testimony of the Commonwealth's ballistics expert or for failing to obtain a ballistics expert for the defense. In support thereof, I note that in regard to objecting to the testimony of the Commonwealth's ballistics expert, trial counsel testified:

> When [Commonwealth's ballistics expert] testified and made it plain that he could not

---

2. When Petitioner raised this issue on appeal, the Superior Court found that the claim was improperly developed, and deemed it waived. Although it is arguable that this claim is unexhausted because it was not properly presented to the state court, *see O'Sullivan v. Boerckle*, 526 U.S. 838, 845 (1999) (to satisfy exhaustion requirement, habeas applicant must present federal claim to all segments of state appellate system in procedurally correct manner, so as to facilitate substantive review on state level); 28 U.S.C. 2254(b) (habeas relief is unavailable unless applicant exhausts state remedies first), I find it unnecessary to address the exhaustion argument as Petitioner's underlying claim is without merit.

> say one way or another whether [the bullets] were fired from one [1] gun or two [2] guns or more than two [2] guns, as a practical matter objecting to it really would not have served the purpose for a couple of reasons. Number one is that the jury already heard it. Two, I didn't want to emphasize it for the jury. And three is if I could save it for argument and say, listen, he wasn't able to say definitively one way or the other, his testimony has no weight and no significance.

See N.T. 6/21/01, at 20. Based on counsel's testimony, the decision not to object to the testimony could reasonably be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

As to hiring a ballistics expert for the defense, trial counsel testified at Petitioner's PCRA hearing that because no guns had been recovered, it was impossible for *any* ballistics expert to connect the bullets taken from the crime scene to any specific firearm. *See* N.T. 6/21/01, at 8. Again, under the circumstances, it was objectively reasonable for trial counsel to decide not to hire a ballistics expert for the defense. Nevertheless, even if trial counsel's representation was found to be objectively unreasonable, *Strickland* further requires that Petitioner establish how the results of the trial would have been different. *Id.* at 694. Petitioner has not asserted that an independent ballistics expert could offer any more information than the Commonwealth's expert. Petitioner argues that an independent ballistics expert

would testify that the shells and bullets collected from the crime scene *could* have been produced by two (2) separate firearms. See Pet'r Br., at 30. However, this is the same testimony that was offered at trial by the Commonwealth's ballistics expert. *See* N.T. 8/8/95, at 94. In light thereof, I find that Petitioner has not produced any evidence that would enable the court to conclude that there is a reasonable possibility that the outcome of the trial would have been different if trial counsel had engaged a ballistics expert for the defense. Accordingly, this claim must be denied.

3. PCRA Court Violated Petitioner's Due Process and Equal Protection Rights by Denying his Request for a Ballistics Expert

In his third (3rd) claim, Petitioner argues that the PCRA Court violated his due process and equal protection rights when it denied his request for a ballistics expert. The Superior Court found that the PCRA court did not abuse its discretion in denying Petitioner's request for a ballistics expert because Petitioner failed to offer reasonable support "as to how a ballistics expert would further [Petitioner's] argument regarding a second gunman." *Id.* Petitioner argues that the decision in *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), requires a different finding. I disagree. The Supreme Court in *Ake* outlined three (3) factors to be used in determining whether the State must provide an indigent defendant with access to psychiatric assistance in preparing a defense. *Id.* Those three (3) factors are: the private interest that will be affected by the action of the

State; the governmental interest that will be affected if the safeguard is to be provided; and *the probative value of the additional safeguards* and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Id.* (emphasis added). As set forth in my review of Petitioner's second claim, Petitioner has failed to show the probative value of the additional safeguard, specifically the value of hiring an independent ballistics expert.[3] Therefore, I am in agreement with the state court that the denial of an appointment of a ballistics expert for the defense was not an abuse of the PCRA's court discretion. Accordingly, I find that Petitioner's Due Process and Equal Protection rights were not violated.

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3. I need not address whether *Ake* even applies outside the realm of trial court level psychiatric defense, as Petitioner fails to satisfy the three (3) part test.

APPENDIX D — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED SEPTEMBER 9, 2004

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2861 EDA 2002

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KARL RAINEY,

Appellant

Appeal from the PCRA Order entered June 4, 2002 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 9412-0717

BEFORE: DEL SOLE, P.J., PANELLA and BECK, JJ.

MEMORANDUM: FILED SEPTEMBER 9, 2004

This is an appeal from the order denying Appellants petition under the Post Conviction Relief Act (PCRA). Appellant was convicted by a jury of first degree murder, aggravated assault and carrying a firearm on a public street. Appellant was sentenced to life in prison for first degree murder, and concurrent sentences of five to ten years for aggravated assault, and one to two years for

carrying a firearm on a public street. Appellant filed a direct appeal which resulted in an affirmance of his judgment of sentence. Following the denial of his petition for allowance of appeal with our Supreme Court, he filed a PCRA petition. Supplemental petitions were filed, followed by an evidentiary hearing after which the PCRA court denied Appellant relief. This appeal followed. We affirm.

Appellant raises four issues for our review. Appellant claims that the PCRA court erred when it failed to find counsel ineffective for failing to present the testimony of Kurtis Rainey and failing to challenge the Commonwealth's ballistics experts or retain an expert. Also, Appellant claims the PCRA court abused its discretion in not permitting him to retain the services of an expert ballistics examiner. Finally, he alleges the PCRA court erred in concluding that trial counsel's failure to raise on appeal the issue of a juror's recantation of the verdict was not ineffective assistance of counsel.

Prior to addressing these issues, we will first address Appellant's response to this Court's order to show cause why this appeal should not be quashed as untimely. The deadline for Appellant to file his notice of appeal was July 4, 2002. Appellant's notice of appeal was post-marked on July 5, 2002, and received by the court on July 8, 2002. Appellant asserts that because July 4 was a holiday, he had until July 5 to file his notice of appeal. We agree.

Appendix D

As stated in 1 Pa.C.S.A. § 1908; "[w]hen any period of time is referred to in any statute ... [and] the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth ... such day shall be omitted from computation." Further under the "prisoner mailbox rule" Appellant's appeal is deemed filed on the date he placed his notice of appeal in the institutional mailbox, or delivered it to prison authorities. *Commonwealth v. Jones*, 700 A.2d 423 (Pa. 1997). Accordingly, since the record indicates Appellant's notice of appeal was post-marked July 5, 2002, it is therefore deemed timely and we will address the merits of Appellant's appeal.

Appellant first asserts that the PCRA court erred by not finding his trial counsel provided ineffective assistance when he failed to present testimony from Kurtis Rainey, Appellant's brother, describing admissions made by Kevin Williams regarding the victim's death.

It is generally accepted that to prevail on a claim that counsel was constitutionally ineffective, the appellant must overcome the presumption of competence by showing that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate appellant's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different. A failure to satisfy any one prong of the test for ineffectiveness will require rejection of the claim.

Appendix D

Commonwealth v. Wharton, 811 A.2d 978 (Pa. 2002) (citations omitted).

Appellant testified he intended to fire several shots from a .380 caliber pistol at the decedent and his friend Ervin Boyd, the victim of the aggravated assault, but that he did not fire the final shots at either victim. The medical examiner identified eight gunshot wounds on the decedent, and the hospital treated three gunshot wounds on Mr. Boyd. The medical examiner testified that "[t]he cause of death was multiple gunshot wounds to the chest and the abdomen and the back." N.T., 8/8/95, at 127. The Commonwealth presented testimony by an expert ballistics examiner that although both .380 and 9mm caliber bullets were recovered from the victims, it was possible for both types of bullets to be fired from the same gun.

Appellant asserts that it was a second gunman, Kevin Williams, who fired the 9mm shots into the victims. Appellant claims he was prejudiced when his counsel failed to present Kurtis Rainey's testimony that he observed Williams with a silver-plated 9mm pistol, and that Williams admitted to Rainey after the incident that "[y]our brother shot them and then I finished it." N.T., 6/21/01, at 32. The Commonwealth argues that the presence of a second gunman, if true, is irrelevant and could not exonerate Appellant of his crimes, but only create the inference of shared criminal intent that would have no bearing on the outcome of the case.

Appendix D

"In order to make a claim of ineffectiveness for failure to interview or present a witness, a petitioner must demonstrate: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the willingness and ability of the witness to cooperate and appear on behalf of the defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice." *Commonwealth v. Priovolos,* 715 A.2d 420, 422 (Pa. 1998) (citing *Commonwealth v. Morales,* 701 A.2d 516 (Pa. 1997)).

Appellants trial attorney testified at the PCRA hearing that he did meet and discuss with Kurtis Rainey the alleged confession by Kevin Williams, and that he investigated the allegation extensively. Upon failing to either locate Mr. Williams or to verify the validity of the confession, trial counsel elected not to present the testimony fearing the bias of Appellant's brother might harm the case.

Our standard of review of a post conviction court's denial of relief is limited to whether the lower court's determination is supported by the evidence of record and whether it is free of legal error. *Commonwealth v. Harmon,* 738 A.2d 1023 (Pa. Super. 1999). We find Appellant is unable to demonstrate he was prejudiced by counsel's actions in failing to present Kurtis Rainey as a witness. In light of Appellants admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound; the introduction of testimony by Appellant's brother which referenced a

second gunman would not have exonerated Appellant. As such, Appellant's accusation of ineffective assistance of counsel fails because the underlying argument is without merit. Furthermore, it is well established that ineffective assistance of counsel will not be found where there is a reasonable basis for counsel's decision based on a matter of trial strategy. *Commonwealth v. Rivera*, 454 A.2d 1067 (Pa. Super. 1982). Trial counsel testified he was aware of and investigated the allegations made by Appellant's brother, and that counsel made a strategic decision not to present the brother's testimony without further support believing it would be harmful to Appellant's case. We find the evidence supports the PCRA court's decision, and the decision is without legal error.

Appellant further contends that trial counsel wrongly failed to challenge the Commonwealth's ballistics expert testimony and failed to retain an expert on Appellant's behalf.

In reviewing Appellant's brief in support of this challenge, we find the argument presented to be improperly developed as it offers no basis as to how an expert would testify in support of Appellant's case. The core of the argument states merely that an expert "could have offered testimony designed to advance his cause." Where an issue has been identified on appeal but is unsupported by a properly developed argument in Appellant's brief it can be considered waived. *Commonwealth v. Rodgers*, 605 A.2d 1228 (Pa. Super. 1992); *Commonwealth v. Nelson*, 567 A.2d 673 (Pa. Super. 1989).

Nevertheless, we find the claim, even if further developed, to be without merit. The Commonwealth's ballistics expert testified at trial that a single gun, or any number of guns, could have fired the .380 and 9mm bullets; the scientific evidence was insufficient to make a conclusion. During the PCRA hearing, Appellant's trial counsel testified he believed the ballistics testimony carried no weight, and because no gun or guns were ever recovered, it was not possible to positively compare the bullets retrieved from the victims to any gun. In counsel's opinion, it was in Appellant's best interest not challenge this testimony so as not to re-emphasize it to the jury, and instead he chose to address it in his closing argument where he could point out its lack of significance. The PCRA court found trial counsel had a reasonable basis designed to effectuate Appellant's interests under the given circumstances, and Appellants trial counsel did not provide ineffective assistance. We find no basis to disturb this ruling.

Appellant next contends the PCRA court abused its discretion by not permitting him to retain the services of a ballistics expert. Appellant argues that without public funding to hire an expert, he is unable to support his theory of a second gunman. We disagree.

The appointment of an expert witness or an investigator to assist in the preparation of a defense is vested in the sound discretion of the trial court and denial thereof will not be disturbed without a finding that the court abused its discretion. *Commonwealth v. Gelormo*, 475 A.2d 765 (Pa. Super. 1984). Based on our review of

Appellant's previous issue, we find there is no reasonable support as to how a ballistics expert would further Appellant's argument regarding a second gunman. As such, the PCRA court did not abuse its discretion in denying Appellants request to retain a ballistics expert.

Finally, Appellant contends the PCRA court erred by not finding his trial counsel ineffective for failing to raise the issue of a juror's recantation of the verdict on direct appeal. The order of events at trial were as follows: the jury submitted its verdict in open court; the jury was polled upon the request of Appellant whereby all members concurred; the verdict was recorded; the jury acknowledged in the affirmative the verdict as recorded; and the jury was discharged to reconvene the following day for sentencing. The following day, prior to the sentencing hearing beginning, one juror recanted his verdict on his own volition. Appellant contends that even though the verdict was duly recorded, it may still be challenged until the jury has been separated and dispersed.

Appellant relies on the Supreme Court case *of Commonwealth v. Downey* that held '[a] motion to poll, be it made at the moment the verdict is first announced in court, or even if made after the verdict is *affirmed and* 'entered' of record, is still timely so long as it is made before the *jury* has dispersed." *Commonwealth v. Downey,* 732 A.2d 593, 595 (Pa. 1999). Appellant's argument is not relevant in the instant case because unlike the cases relied upon in his brief, the jury was polled and all members concurred with the guilty verdict prior to their discharge.

Further, as noted by the PCRA court, even though the same members of the jury were to reconvene for sentencing the following day, they were effectively discharged from the guilt phase of the trial. The law is clear, that after a jury verdict is duly recorded and the jury has been discharged, individual jurors may not invalidate or impeach their verdict by their own testimony without claiming outside influence. *Commonwealth v. Patrick*, 206 A.2d 295 (Pa. 1965); Commonwealth *v. Spencer*, 393 A.2d 895 (Pa. Super. 1978); *Commonwealth v. Stark*, 526 A.2d 383 (Pa. Super. 1987).

Accordingly, as the underlying claim was without merit, the PCRA court properly ruled Appellant's counsel was not ineffective for failing to present it on direct appeal.

Order affirmed.

Judgment Entered

s/ [illegible]
Prothonotary

Date: September 9, 2004

APPENDIX E — OPINION OF THE COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, TRIAL DIVISION, CRIMINAL SECTION DATED NOVEMBER 17, 2003

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF
PENNSYLVANIA, TRIAL DIVISION -
CRIMINAL SECTION

C.P. 9412

NO. 0717

COMMONWEALTH OF PENNSYLVANIA

V.

KARL RAINEY

OPINION

MAZZOLA, J.

The facts established at trial are as follows. Petitioner, Karl Rainey, and the decedent, Kenneth White, had a prior history of confrontations. On November 19, 1994, White followed Petitioner out from a bar and attempted to provoke a confrontation. When Petitioner had reached his parked vehicle, he pulled out his gun and shot White multiple times. Petitioner then shot White's friend Ervin Boyd who tried to intervene. Petitioner then returned to shoot at the back of White

who had fallen to the ground. Petitioner then shot at Boyd multiple times, and got into his car and drove off, dragging Boyd's body approximately one city block. Boyd survived his wounds.

At trial, Petitioner contended that he had shot White and Boyd in self defense, but that another gunman then jumped in to shoot White and Boyd multiple times.

On August 10, 1995, Petitioner was convicted of first degree murder, aggravated assault, and possession of an instrument of crime. The next day, the jury imposed a sentence of life imprisonment on the murder conviction, and the court imposed concurrent sentences of five to ten years for the aggravated assault conviction and six to twelve months for possessing an instrument of crime.

Superior Court affirmed trial court's judgment of sentence on January 16, 1997, and the Supreme Court denied allocatur on November 3, 1997.

On October 30, 1998, Petitioner filed a *pro se* petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. The PCRA court appointed counsel, Harvey L. Anderson, Esq., and he filed an amended petition on June 8, 2000. Petitioner now appeals the dismissal, on June 4, 2002, of his amended petition.

Petitioner, in his amended petition and supplements thereto, alleged that he was provided ineffective assistance of counsel for the following reasons: (1) trial counsel failed to call his brother, Kurtis Rainey, as a

witness; (2) trial counsel failed to obtain a ballistics expert; (3) trial counsel failed to object to the testimony of the Commonwealth's ballistic expert; (4) appellate counsel failed to raise on appeal trial court's refusal to grant a bench trial; (5) appellate counsel failed to raise on appeal the issue of jury recantation; (6) trial counsel failed to object to prosecutor's improper remarks during closing argument.

LEGAL ANALYSIS

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness. *Commonwealth v. Green,* 551 Pa. 88, 93 (1998).

Having failed on his appeal where he challenged the verdict on self defense grounds, Petitioner now contends that he cannot be guilty of first degree murder because White died due to multiple gunshot wounds inflicted by him and an alleged second shooter. It seems that Petitioner is claiming that his actions were not the "but for" cause of White's death, and therefore he cannot be guilty of first degree murder. Yet while the two gunmen theory could only go to causation, and not the mental state, Petitioner inexplicably says that he could at best be convicted of voluntary manslaughter. Since the mental state, and not causation, differentiates first degree murder from voluntary manslaughter, this court cannot

see the logic behind Petitioner's argument. It seems that Petitioner is attempting to say, through his reliance on the two gunmen theory, that the evidence was insufficient to establish first degree murder. However, Petitioner challenged the sufficiency of the evidence on appeal, and thus he cannot raise this issue again. *See* 42 Pa.C.S. § 9543(a)(3) (stating that to be eligible for relief under the PCRA, the allegation of error must not have been previously litigated or waived). Accordingly, this claim was properly dismissed.

Moreover, it was established at trial that Petitioner shot White multiple times, therefore the existence of a second shooter who also shot White multiple times would not have made a difference to Petitioner's murder conviction. Further, because no witnesses testified that White was armed, the existence of the second shooter would not have made a difference to Petitioner's self defense claim. This court finds that further attempts by the trial counsel, as Petitioner contends the counsel should have taken, to establish the existence of the second shooter would not have made a difference in the outcome of the trial. Accordingly, Petitioner's claims related to the possible existence of the second shooter were properly dismissed. *See Green, supra.*

Petitioner contends that the trial judge abused his discretion in denying Petitioner's request for a bench trial. However, a defendant does not have an absolute right to a bench trial. *See Commonwealth v. Sorrell*, 500 Pa. 355, 359 (1982) ("[T]he decision whether to permit a non-jury trial is to be made by the court, taking into

account all relevant considerations."). After reviewing the trial record, this court finds that the trial court considered the proposed evidence and the proposed defense, and decided that a jury trial would serve Petitioner's interests better than a bench trial. Therefore, the trial court did not abuse it's discretion in denying the request for a bench trial. *See Commonwealth v. Boyd*, 320 Pa. Super. 560, 563 (1983) (Stating that trial judge has discretion to decide whether to approve request for a waiver trial.).

Petitioner, nevertheless, claims that he is entitled to a new trial since the trial judge did not state on the record the reason for denying his waiver request. The trial court should state its reason for the denial of waiver so that an appellate court can decide whether trial court abused its discretion. *See Boyd*, 320 Pa. Super. at 563 ("If the court decides to disapprove the waiver, it should state the reasons for its decision, so that on any further appeal we may decide whether it has acted within its discretion."). In the instant case, the reason for denying the waiver is discernable from the record. Therefore, Petitioner's claim is without merit, and properly dismissed.

Petitioner also asserts that the appellate counsel should have raised on appeal the trial court's denial of Petitioner's motion for a mistrial based on a juror's attempt to impeach the verdict after it was recorded. Petitioner contends that a juror can impeach the verdict, even after the verdict has been recorded, if it is before the jury is discharged. However, this Court finds

persuasive the Commonwealth's argument that if Petitioner's argument is accepted, then in any case where the jury is retained for a separate penalty phase, the recorded verdict would be impeachable until the penalty phase is over and the jury is physically discharged. Such a result would be absurd.

In the instant case, a juror tried to impeach the verdict, the day after the verdict had been recorded, without claiming any outside influence. The Supreme Court in *Commonwealth v. Patrick,* 416 Pa. 437, 442 (1965), stated that, "Our Courts have repeatedly held for over 150 years that after a verdict is recorded, and after the jury has separated and been discharged, jurors may not invalidate or impeach a verdict by their own testimony." In the instant case, when the verdict was recorded and the jury dismissed for the day with the penalty phase set to begin the next day, the jury had effectively been discharged from the trial phase. Therefore, the trial court acted properly in denying the juror's attempt to impeach the verdict. Accordingly, Petitioner's claim with regard to this matter was properly dismissed.

Next, Petitioner asserts that the prosecutor engaged in misconduct in his closing argument by stating that if Petitioner's gun were to be found, then the jury would know that the Petitioner shot all the bullets. However, the prosecutor is entitled to respond fairly to a defendant's closing argument. *See Commonwealth v. Hawkins,* 549 Pa. 352, 393 (1997) ("[T]he prosecutor is entitled to fairly respond to evidence presented by the

defendant or to closing remarks made by defendant's counsel."). This court finds that the prosecutor's comments were a fair response to Petitioner's closing argument where the trial counsel stated that Petitioner discarded his weapon not because he was afraid of the possibility of ballistics examination showing that he fired all the shots, but because he was simply afraid. Moreover, a prosecutor's comments do not constitute reversible error "unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." *Id.* at 373. Since the prosecutor's comments were a fair response to the Petitioner's closing argument, and since Petitioner failed to show the requisite prejudice, Petitioner's claim with respect to the prosecutor's comments was properly dismissed.

CONCLUSION

After thorough consideration, none of the claims raised by the Petitioner warranted granting of relief. Accordingly, this court's dismissal of Petitioner's amended PCRA petition should be affirmed.

BY THE COURT:

s/ [illegible]
J.

APPENDIX F — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JANUARY 16, 1997

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 4275 PHILADELPHIA 1995

COMMONWEALTH OF PENNSYLVANIA

v.

KARL RAINEY,

APPELLANT

Appeal from the Order entering Judgment of Sentence December 8, 1995 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. C.P. 94-12-0717.

BEFORE: DEL SOLE, SCHILLER AND CERCONE, JJ.

MEMORANDUM:

Appellant Karl Rainey was convicted by a jury of first degree murder, aggravated assault and possession of an instrument of crime. He received a sentence of life imprisonment for the murder conviction, and concurrent sentences of five to ten years for the aggravated assault conviction and six to twelve months for PIC. Appellant's post-sentence motions were denied. This appeal followed. We affirm.

Appendix F

Appellant presents the following issues for our review: (1) whether there was sufficient evidence to prove first degree murder; and (2) whether the verdict was against the weight of the evidence.

In advancing his sufficiency of the evidence claim, Appellant argues specifically that the Commonwealth failed to prove beyond a reasonable doubt that he did not act in self-defense.

The test for determining the sufficiency of the evidence is to view the evidence in the light most favorable to the verdict winner to determine whether the fact finder reasonably could have concluded that all of the elements of the crime were established beyond a reasonable doubt. *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).

When a self-defense claim is raised at trial, the Commonwealth, in order to negate the claim, is required to prove beyond a reasonable doubt at least one of the following: either that a defendant's belief that it was necessary to kill the victim in order to protect himself from death or serious bodily harm was unreasonable, that the defendant provoked the use of force, *or* that the defendant had a duty to retreat and could safely do so. *Commonwealth v. Upsher*, 497 Pa. 621, 444 A.2d 90 (1982), *Commonwealth v. Gonzales*, 415 Pa.Super. 564, 609 A.2d 1368 (1992).

Self-defense issues of whether a defendant acted out of an honest, bona fide belief that he was imminent

danger and whether such belief was reasonable are questions properly resolved by the finder of fact. *Commonwealth v. Hill,* 427 Pa.Super. 440, 629 A.2d 949 (1993).

The facts establish that Appellant and the Decedent Kenneth White had several verbal confrontations prior to the night of the murder. On the night in question, Appellant was leaving a bar when Decedent and his friend Ervin Boyd were entering the bar. Appellant and Decedent began to argue as Appellant walked to his car. Boyd followed along. Upon arriving at his car, Appellant pulled a gun from his jacket and shot Decedent several times. Appellant then shot Boyd who hid behind a parked car. Appellant cleared a jam in his gun, returned to Decedent's body and fired three more shots into Decedent's back. Then, Appellant found Boyd and shot him three more times. As Appellant fled from the scene, he ran over Boyd and dragged him one block from the scene. Boyd survived and Decedent bled to death. No weapon was found on or near Decedent's body.

Appellant claims that he was in fear of his life. However at trial, Appellant admitted shooting the victim even though he knew the victim was unarmed. Furthermore, once the Decedent was helpless on the ground, Appellant returned to shoot him several more times. This evidence is more than sufficient for the jury to find that it was unreasonable for Appellant to believe that it was necessary to kill Decedent to protect himself from death or serious bodily harm. Therefore, this issue is meritless.

Appendix F

Next, Appellant questions whether the verdict was against the weight of the evidence. In reviewing such a claim, a new trial will not be warranted unless the verdict was so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Whitney,* 511 Pa. 232, 512 A.2d 1152 (1986). Also, the finder of fact is free to believe all, part, or none of the evidence. *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986).

The jury, as fact finder, chose to believe the evidence presented by the Commonwealth, as was its right. This evidence, although contradicted, was weighty enough for the jury to issue the guilty verdicts and Appellant's argument to the contrary is meritless.

Judgment of sentence affirmed.